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**Fiscal and Small Business Impact of the 2008 Amendments to the Attorney General's Brownfields Covenant Regulations, 940 CMR 23.00**

The Massachusetts Administrative Procedure Act ("APA") requires that Commonwealth agencies filing a new or amended regulation with the Secretary of State analyze the regulation's general fiscal impact and, more particularly, its impact on small business. M.G.L. c. 30A, § 5:

> No rule or regulation so filed with the state secretary shall become effective until an estimate of its fiscal effect including that on the public and private sector, for its first and second year, and a projection over the first five-year period, or a statement of no fiscal effect has been filed with said state secretary. In addition, no rule or regulation so filed, unless filed for the purposes of setting rates within the commonwealth, shall become effective until an agency has filed with the state secretary a statement considering the impact of said regulation on small business. Such statement of consideration shall include, but not be limited, to a description of the projected reporting, record keeping and other compliance requirements of the proposed regulations, the appropriateness of performance standards versus design standards and an identification of all relevant regulations of the promulgating agency which may duplicate or conflict with the proposed regulation.

## I. Summary of Amendments

The Attorney General's Brownfields Covenant Regulations, 940 CMR 23.00, provide procedures and substantive criteria for obtaining Brownfields Covenant Not to Sue Agreements ("Brownfields Covenants"). Brownfields Covenants provide current and prospective property owners protection from certain claims by the Commonwealth and third parties for cleanup costs and property damage in exchange for commitments to clean up in accordance with state standards and redevelop in ways that contribute to the physical or economic revitalization of the community. They are appropriate for parties who do not qualify for liability relief directly under Chapter 21E. The Attorney General first adopted the Brownfields Covenant Regulations in 1999.

The 2008 amendments make applying for a Brownfields Covenant more efficient and expand the circumstances where a covenant would be useful, with the goal of increasing the number of properties eligible for Brownfields Covenants without sacrificing the Commonwealth's cleanup

standards or other environmental goals. Specifically, the amendments: (1) shorten the public comment period on applications for Brownfields Covenants when an applicant is an "eligible person" under Chapter 21E (i.e., did not cause or contribute to the contamination and did not own or operate the site at the time of the contamination); (2) amend notification requirements to clarify the rules and eliminate unnecessary notice; (3) clarify what role third parties can play in commenting on applications or participating in Brownfields Covenant negotiations; (4) allow Brownfields Covenants to vest immediately when the remedial plan includes the possibility of a temporary solution; (5) make express the long-held policy that a project is presumed to contribute to the economic or physical revitalization of the community if it has the support of the municipality in which the project is located; and (6) provide for a variety of other changes to promote clarity.

## II. Statement of Fiscal Effect

Commonwealth agencies are required to prepare "an estimate of [a regulation's] fiscal effect including that on the public and private sector, for its first and second year, and a projection over the first five-year period, or a statement of no fiscal effect." M.G.L. c. 30A, § 5. The APA does not define "fiscal effect," but the Secretary of State's Regulations Manual states "[t]his requirement does not mean the cost/benefit analysis that accompanies federal regulations, but rather an agency's best judgment of the 'out of pocket' expenses that will be incurred in complying with the regulation."[1]

The Brownfields Covenant Regulations, because they implement a voluntary program, do not compel regulated entities to incur "out of pocket" expenses. Those who do apply for a Brownfields Covenant, however, are subject to transaction costs of two kinds. First, an applicant seeking liability protection from third parties must pay the costs associated with public notice of an application. Two of the three required forms of public notice are likely to require payment: (1) registered mail or in-hand delivery notice to abutters and other interested parties; and (2) publication in a local newspaper for two consecutive weeks. The total expected costs of notice are impossible to predict, because the number of abutters and other parties requiring registered mail or in-hand notice will vary from site to site, and the cost of newspaper notice will vary from community to community. Second, an applicant will likely need the assistance of an attorney and an environmental consultant to fill out an application and negotiate the terms of a Brownfields Covenant. The cost of these professional fees to an applicant is impossible to estimate because, again, each site is unique and the application process will require unique support.

The amendments will lower the costs of notice because they reduce the number of required newspaper notices from three to two, and they allow for fewer notices to abutters. The Attorney General expects that the amendments, which reduce the public comment period for certain applicants, will also lower other transaction costs, like professional fees, because of shorter negotiation periods, but the uniqueness of each contaminated site makes it difficult to predict cost savings with any precision.

[1] The Secretary of the Commonwealth, The Regulations Manual, March 2008, p. 13, available at http://www.sec.state.ma.us/spr/sprpdf/manual.pdf.

Costs in First Year and Subsequent Years

The APA requires an estimate of fiscal effect for a regulation's "first and second year, and a projection over the first five-year period." Because the Brownfields Covenant Regulations are only applicable to qualified entities on a project–by-project basis, not on an ongoing basis that creates annual costs, there will be no greater costs for the first year or any subsequent year of effectiveness of the regulations, other than the transaction costs related to a particular project.

Public Sector Impacts

A public entity might be an applicant for a Brownfields Covenant, as applicants may be any current or prospective owner or operator, public or private, of a contaminated site. Because the amendments make no distinction between public and private applicants, costs of compliance for public entities should be the same as those for private applicants.[2]

## III. Statement of Impact on Small Business

It is certain that the amendments will have an impact on small business, as small property owners and developers commonly make use of Brownfields Covenants to protect themselves while redeveloping contaminated property.

The amendments to the Brownfields Covenant Regulations may affect small businesses in many sectors, because Brownfields Covenants may be used by any business interested in redeveloping contaminated property. The most common applicants for Brownfields Covenants have been real estate developers, but other recent applicants include a plastics manufacturing company looking to sell contaminated property, a chemical manufacturer looking to redevelop a contaminated site to expand its operations, and a gasoline service station owner refurbishing an old gas station. What qualifies as a "small business" varies by sector, but many applicants in these sectors or

[2] A second potential fiscal effect on the public sector is the potential indirect costs and benefits of brownfields redevelopment encouraged by the regulatory amendments. The regulations' purpose is to generate more redevelopment at contaminated sites, which may have the effect of creating more work for the Massachusetts Department for Environmental Protection and other state and local regulators affected by brownfields activity, and the effect of generating more tax revenue and other benefits of increased economic activity at a site. Analysis of this second type of fiscal effect on the public sector does not appear to be required by the APA. In its Regulations Manual, for instance, the Secretary of State's Office interprets the APA to require estimates of the "costs of complying" with the regulation, which indicates that the focus is on the costs to those subject to regulation, not indirect costs experienced by public agencies. While the Attorney General expects the amendments to lead to greater site redevelopment, an analysis of the indirect public sector costs and benefits is not attempted here.

[2] The APA does not define "small business," but the Secretary of State's Regulations Manual references the standard promulgated by the federal Small Business Administration, found in the Code of Federal Regulations at 13 C.F.R. Part 121. These standards define "small business" by specific industry, trade or service and by the number of employees or the dollar amount of annual receipts. Some examples of small businesses in active Massachusetts business sectors, listed at 13 C.F.R. § 121.201, are: Digital Printing companies (North American Industry Classification Code ("NAICS") Code 323115) of up to 500 employees; Pharmaceutical Preparation Manufacturing companies (NAICS Code 325412) of up to 750 employees; Computer Storage Device Manufacturing companies (NAICS Code 334112) of up to 1,000 employees; Gasoline Stations with Convenience Stores (NAICS Code 447110) with annual receipts of up to $27.0 million, and Lessors of Residential Buildings and Dwellings (NAICS Code 531110) with annual receipts of up to $7.0 million.

similar ones will qualify.[3]

An agency's statement considering the impact of its regulation on small business must include: (1) a description of the projected reporting, record keeping and other compliance requirements imposed by the regulations; (2) a discussion of the appropriateness of performance standards versus design standards; and (3) identification of all relevant regulations of the promulgating agency which may duplicate or conflict with the proposed regulation.

Description of the Projected Reporting, Record Keeping and Other Compliance Requirements

The Brownfields Covenant Regulations, which help implement a voluntary program, do not compel any reporting, recordkeeping or other compliance requirements on small businesses, except for those that apply for Brownfields Covenants.

For those small businesses that choose to apply for a Brownfields Covenant, the Brownfields Covenant Regulations require preparation of an application, public notice, and for certain applicants, a certification of eligibility. Because the application requires detailed technical descriptions of the property proposed for redevelopment, the contamination at issue, and cleanup status of the site, and legal explanations of the applicant's potential liability at the site, it is expected that an applicant will need the services of an environmental scientist or consultant, and an attorney, to complete the application and related documentation. The application requires some information that is likely to have been created for other purposes. For example, descriptions of site conditions and cleanup status are required for compliance with the Massachusetts Contingency Plan ("MCP"), the cleanup regulations at 310 CMR 40.0000 established by the Massachusetts Department of Environmental Protection ("MassDEP"). The required description of the proposed redevelopment project is likely to reflect the level of detail prepared for early-stage presentations to local planning and permitting agencies. Some effort, however, will be required to prepare such previously gathered information for presentation in the application.

After the application and negotiation of a Brownfields Covenant with the Attorney General, there are no ongoing recordkeeping or compliance requirements other than to carry out the proposed development as described in the agreement and to perform site cleanup in accordance with the MCP.

The amendments should reduce reporting, record keeping and compliance requirements for many applicants because they reduce some of the burden of providing public notice of an application.

[3] The APA does not define "small business," but the Secretary of State's Regulations Manual references the standard promulgated by the federal Small Business Administration, found in the Code of Federal Regulations at 13 C.F.R. Part 121. These standards define "small business" by specific industry, trade or service and by the number of employees or the dollar amount of annual receipts. Some examples of small businesses in active Massachusetts business sectors, listed at 13 C.F.R. § 121.201, are: Digital Printing companies (North American Industry Classification Code ("NAICS") Code 323115) of up to 500 employees; Pharmaceutical Preparation Manufacturing companies (NAICS Code 325412) of up to 750 employees; Computer Storage Device Manufacturing companies (NAICS Code 334112) of up to 1,000 employees; Gasoline Stations with Convenience Stores (NAICS Code 447110) with annual receipts of up to $27.0 million, and Lessors of Residential Buildings and Dwellings (NAICS Code 531110) with annual receipts of up to $7.0 million.

Appropriateness of Performance Standards Versus Design Standards

The amendments to the Brownfields Covenant Regulations maintain the general approach of using performance standards for reviewing applications for Brownfields Covenants. A performance-based standard is one that specifies a required standard but gives the regulated community a choice in how to meet that standard. A design-based standard, by contrast, specifies how regulated entities are to meet regulatory requirements (e.g., by describing what technology or methodology people must use in their regulated activity). The Brownfields Covenant Regulations require that applicants propose a site cleanup outcome (a Permanent Solution, Remedy Operation Status or, in some circumstances, a Temporary Solution), and a redevelopment project (an Eligible Brownfields Project), without providing explicit design standards for how applicants are to achieve these outcomes.

The Brownfields Covenant standards are designed to allow property owners and developers to determine for themselves which cleanup and redevelopment approaches are appropriate for their projects, as long as they meet the ultimate standards described. The Attorney General's approach complements the approach of the MCP, which provides performance-based regulation of contaminated sites by setting cleanup standards while allowing those performing cleanups to decide how they will meet those standards (albeit with deadlines and certain procedural requirements to ensure timely response). The Attorney General's goal is to create incentives for property owners and developers to clean up and redevelop underutilized or abandoned contaminated properties, bringing investment to sites that may languish without a Brownfields Covenant to protect the developer from liability. Performance standards create a greater incentive for this type of redevelopment, because they allow a greater range of potential redevelopment to fit a contaminated site. They are less burdensome on developers than design standards because they allow a developer the flexibility to determine how to build a project.

Identification of All Relevant Regulations of the Promulgating Agency Which May Duplicate or Conflict with the Proposed Regulation

The Attorney General has no other regulations regulating brownfields or owners or operators of contaminated sites other than the Brownfields Covenant Regulations.